TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 118.

MERCHANTS HEAT AND LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES B. CLOW AND SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 22, 1905.

(19,910.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1906.

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1 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division, *ss:*

26678.

JAMES B. CLOW & SONS, a Corporation,
vs.
MERCHANTS HEAT AND LIGHT COMPANY, a Corporation.

Transcript of Record for the Supreme Court of the United States.

Newton Wyeth, W. B. Wilson, W. L. Fisher, Attorneys for Plaintiff.

Charles H. Aldrich, W. H. H. Miller, Henry S. McAuley, Attorneys for Defendant.

2 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

To Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said District:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States at Washington under the writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, towit:—

1. Præcipe.
2. Summons and return of Marshal.
3. Declaration.
4. Plea and Notice of Set Off.
5. Bill of Particulars.
6. Stipulation waiving Jury.
7. Judgment entered September 6th, 1905.
8. Bill of Exceptions.
9. Petition for Writ of Error.
10. Assignments of Error.
11. Bond on Writ of Error.
12. Order allowing Writ of Error.
13. Certificate of Jurisdictional Questions involved.

ALDRICH & McAULEY,
Attorney- for Defendant.

3 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, on Monday September the 18th, 1905, being one of the days of a regular term of said Court begun and held at the United States Court room in the City of Chicago in said District and Division on Monday July 3rd in the year of our Lord one thousand nine hundred and five, and of the Independence of said United States the one hundred and twenty-ninth year, before the Honorable Arthur L. Sanborn, Judge of the district Court of the United States for the Western District of Wisconsin, present and holding said Circuit Court by virtue of the following Order of Assignment entered of record in said Court, towit:—

4 *Copy of Assignment of Judge Arthur L. Sanborn, Monday, July 3rd,* 1905.

Present: Hon. Peter S. Grosscup, presiding Circuit Judge.

By virtue of the authority vested in me by law and because in my judgment the public interest so requires, I do hereby designate and appoint the Honorable Arthur L. Sanborn, Judge of the District Court of the United States for the Western District of Wisconsin: the Honorable J. Otis Humphrey, Judge of the District Court of the United States for the Southern District of Illinois; the Honorable A. B. Anderson, Judge of the District Court of the United States for the District of Indiana; and the Honorable Francis M. Wright, Judge of the District Court of the United States for the Eastern District of Illinois, to aid the Judges of the Circuit and District Courts of the United States for the Northern District of Illinois in holding the Circuit and District Courts of the United States in said Northern District of Illinois at Chicago and Freeport, with all the powers conferred on them by the Act of Congress in the premises.

5 Be it remembered that on the 14th day of March, 1903, James B. Clow & Sons, plaintiff, by M. R. Osborn its attorney, (Mr. Newton Wyeth being afterwards substituted as attorney for said plaintiff), filed in the clerk's office of said court its præcipe for summons, and that on the same day said writ was issued and delivered to the marshal of said district to execute, the same being afterwards returned and filed on the 25th day of March, 1903, which said præcipe, summons and marshal's return thereon are severally in the words and figures following, towit:—

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, ss:

Circuit Court, May Term, A. D. 1903.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT AND LIGHT COMPANY.

In Law. Damages, $15,000.

The Clerk of said Court will issue a Summons in said cause to said defendants, in a plea of Trespass on Case on promises to the

damage of said plaintiff in the sum of Fifteen Thousand Dollars direct the same to the United States Marshal for said District to execute, and make it returnable to the May Term of said Court, 1903.

Dated this 14th day of March A. D. 1903.

M. R. OSBORN,
Plaintiff's Attorney.

To Marshall E. Sampsell, Esq., Clerk.

Endorsed: Filed Mar. 14, 1903. Marshall E. Sampsell, Clerk.

6 Circuit Court of the United States of America, Northern District of Illinois, Northern Division, *ss:*

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon Merchants Heat and Light Company, if found in your district, to be and appear before our Judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof to be holden at Chicago, in the District aforesaid, on the first Monday of May next to answer unto James B. Clow & Sons of a plea of trespass on the case upon promises, to its damage, as is alleged, of Fifteen Thousand ($15,000.) Dollars, and have you then and there this Writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, aforesaid, this 14th day of March in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARSHALL E. SAMPSELL, *Clerk.*

I have served this writ within my District upon the within named "Merchants Heat and Light Company" by reading the same to and in the presence and hearing of W. H. Schott, General Manager of the said company, at the same time delivering to him personally a true copy thereof on the 23rd day of March A. D. 1903.

I was unable to find the President or any other officer of the said company within my District.

JOHN C. AMES,
U. S. Marshal,
WM. E. CASS, *Deputy.*

1 Service	$2.00
1 Mile	.06
	$2.06

Endorsed: Filed Mar. 25, 1903. Marshall E. Sampsell, Clerk.

7 *Copy of Declaration. Filed April 22d,* 1903.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of United States for the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS, a Corporation,
vs.
MERCHANTS HEAT & LIGHT COMPANY, a Corporation.

Now comes James B. Clow & Sons, the plaintiff in this suit, by Morris R. Osborn, its attorney, and complains of the defendant, Merchants Heat & Light Company, of a plea of trespass on the case upon promise.

For that whereas the plaintiff is, and at and prior to the time of the commencement of this suit, was and ever since has been a corporation duly organized under the laws of the State of Illinois, and a Citizen of the State of Illinois; and the defendant, Merchants Heat & Light Company, at the time of the commencement of this suit was, ever since has been and still is, a corporation duly organized under the laws of the State of Indiana, and a citizen of the State of Indiana.

For that whereas, the said defendant, heretofore, towit: On the thirtieth day of March in the year of our Lord One Thousand Nine Hundred and Three, at Chicago, towit: at the District aforesaid, became and was indebted to the said plaintiff, in the sum of fifteen thousand dollars of lawful money of the United States of America,

8 for divers goods, wares and merchandise, by the said plaintiff, before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, towit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant afterwards, towit: on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares and merchandise of the said plaintiff, the said defendant, Merchants Heat & Light Company, then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and

the said plaintiff, avers, that the said goods, wares and merchandise last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of fifteen thousand dollars, of like lawful money as aforesaid towit: at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, The said defendant, afterwards, towit: on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of fifteen thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out and ex-
9 pended for the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, towit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant, afterwards towit: on the day and year last aforesaid, and at the place last foresaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of Fifteen Thousand Dollars of like lawful money as aforesaid and being so found in arrears and indebted to the said plaintiff the said defendant in consideration thereof afterwards towit: on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, The said defendant, although often requested, etc., has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff
10 the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of Fifteen thousand Dollars, and therefore the said plaintiff brings suit, etc.

MORRIS R. OSBORN,
Plaintiff's Attorney.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of United States for the Northern District of Illinois.

James M. Johnson, being duly sworn on his oath, says that he is the Treasurer of James B. Clow & Sons, a corporation, the plaintiff in the above entitled cause; that the demand of the said plaintiff is for the reasonable value of goods, wares and merchandise, consisting mainly of pipes, valves, etc., sold and delivered by the plaintiff to the defendant at the defendant's special instance and request and that there is due to the plaintiff from the defendant, after allowing to the defendant all just credits, deductions and off-sets, the sum of Nine Thousand three hundred and ninety-one Dollars and one cent ($9391.01).

JAMES M. JOHNSON.

Subscribed and sworn to before me this 22nd day of April.

JAMES F. SLAPAK,
[SEAL.] *Notary Public, Cook County, Illinois.*

Endorsed: Filed Apr. 22, 1903. Marshall E. Sampsell, Clerk.

11 *Copy of Plea of General Issue and Notice of Set-off. Filed August 14th,* 1903.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT AND LIGHT COMPANY.

And the defendant, by Charles H. Aldrich and W. H. H. Miller, its Attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form as the plaintiff hath above thereof complained against it; and of this, it put itself upon the country, etc.

CHARLES H. ALDRICH,
W. H. H. MILLER,
Attorneys for Defendant.

To the above-named plaintiff:

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence, and insist, that the plaintiff was before and at the time of the commencement of this action, and still is, indebted to the defendant in the sum of Fifteen Thousand

Dollars ($15,000) for and on account of the failure of said plaintiff to furnish pipe, valves and fittings by October first, 1902,
12 in accordance with the contract between the plaintiff and defendant bearing date August 13, 1902, that by and on account of each failure the defendant was put to great additional expense in the installation of its plant by reason of the difficulty of making the necessary excavations during the months of December, January and February, 1902 and 1903.

And also that by reason of plaintiff's delay in furnishing said pipes, valves and fittings as agreed, it, the said defendant, was unable to furnish its customers with heat, light and power until long after the time it had agreed so to do, and also lost many contracts to so furnish heat, light and power which it could have secured had the completion of its, the defendant's, plant not been delayed as aforesaid by plaintiff.

Whereby the defendant was damaged in the sum of Fifteen Thousand Dollars ($15,000), and that on such trial the defendant will set off and allow to the plaintiff against any demand on its part to be proved on such trial, so much of the said sum of money so due it to the defendant as will be sufficient to satisfy and discharge such demand.

Dated this 10th day of August A. D. 1903.

CHARLES H. ALDRICH,
W. H. H. MILLER,
Attorneys for Defendant.

To M. R. Osborn, Esq., Attorney for the Plaintiff.

13 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT AND LIGHT COMPANY.

William C. Bobbs, being duly sworn upon his oath, says that he is President of the above-named defendant, and that he verily believes it has a good defense to said suit upon the merits, unto the whole of the plaintiff's claim and demand.

WILLIAM C. BOBBS.

STATE OF INDIANA, *Marion County, ss:*

Subscribed and sworn to before me, this 10th day of August, A. D. 1903.

[SEAL.] JAMES W. FESLER,
Notary Public.

Endorsed: Filed Aug. 14, 1903. Marshall E. Sampsell, Clerk.

14 Additional Notice of set-off filed by leave of Court and upon notice to the plaintiff March 29th, 1905.

15 *Copy of Additional Notice of Set-off.*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

26678.

JAMES B. CLOW AND SONS
vs.
MERCHANTS HEAT AND LIGHT COMPANY.

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant in the sum of Four Thousand Dollars ($4,000.00), for and on account of over-payments made by said defendant to said plaintiff.

ALDRICH & McAULEY,
Attorneys for Defendant.

(Endorsed:) Filed Mar. 29, 1905. Marshall E. Sampsell, Clerk.

16 *Copy of Bill of Particulars. Filed December 3rd,* 1903.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, ss:

In the Circuit Court of the United States.

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Bill of Particulars.

Overcharges in Invoices rendered by James B. Clow & Sons.

1902.			
October 16.	Invoice bill 680 feet, 2⅝ inches, 15 inch pipe, at $3.61 per foot	....	$2455.59
	Contract price, $3.32 per foot; Overcharge	....	197.26
1902.			
October 20.	Invoice bill 497 feet, 7⅝ inches, 15 inch pipe at $3.61 per foot	....	$1796.46
	Contract price, $3.32 per foot Overcharge	....	144.31
	Above paid by Voucher No. 116, dated November 8, 1902. Receipted by James B. Clow & Sons, December 6, 1902.		

1902.
November 5. Invoice bill, 273 feet, 9¾ inches, 20 inch pipe at $4.67 per foot $1278.71
Contract price, $3.89 per foot.
17 Total overcharge $213.57

1902.
November 5. Invoice bill, 281 feet, 9 inches, 20 inch pipe at $4.67 per foot $1315.77
Contract price, $3.89 per foot,
Overcharge 219.77

November 8. Invoice bill*ed*, 262 feet, 5¾ inches 20 inch pipe at $4.67 per foot $1225.78
Contract price, $3.89 per foot.
Overcharge $204.73

November 12. Invoice bill 300 feet, ⅝ inch, 20 inch pipe at $4.67 per foot $1401.25
Contract price, $3.89 per foot.
Overcharge $234.04

Above paid by voucher No. 154, dated November 21, 1902.
Rec ipted by James B. Clow & Sons, November 22, 1902.

To 72 feet, 20 inch pipe purchased of Knight & Jillson, at $4.14 ..... $298.08
Contract price with James B. Clow & Sons, $3.89..... 280.08

Increased cost chargeable against Clow & Sons.. 18.00

Expense of refilling and re-excavating trench and extra barricades due to delay in delivery of 72 feet, twenty inch pipe, finally purchased of Knight & Jillson, Indianapolis, at corner Washington & Delaware Streets $210.00

18 Increased cost of laying pipe during months of December, 1902, January and February, 1903, due to delay in delivery.

2325 feet, 15 and 20 inch pipe, $2.75 per
3* foot $6393.75

6975* ..... (6298.15)*
Additional premium for liability insurance $575.83
Additional expense for superintendent and foreman $1055.00
Estimated loss on account contracts for heating by delay in completion of contract of James B. Clow & Sons..... $6608.10

[* In pencil in copy.]

(Radiation connected November 24, 1903—113 consumers,—150,000 square feet. At least one half of these consumers could have been connected December 1, 1902, had contract with Clow & Sons been fulfilled.)

19 *Estimated Loss Account Contracts for Light and Power by Delay in the Completion of Contract of James B. Clow & Sons from January 1, 1903, to Time of Connection.*

F. A. Braxton	$31.50
Boehmer Shoe Co.	130.00
J. A. Everett	48.75
H. A. Comstock	32.00
J. Cohen	41.45
Columbia National Bank	90.00
J. A. Chambers	210.00
Fred Heier (W. Pearl)	62.50
G. L. Knox	38.50
June Bros.	232.25
Indianapolis Electrotype Co.	82.00
C. W. Meikel & Co.	400.00
M. McManus	16.00
W. H. Quinn	45.00
Reliable Furniture Company	262.00
J. H. Reed	34.00
W. H. Rolls' Sons	2.25
C. L. Rost	44.30
Fred Heier (S. New Jersey)	107.50
Charles Sheperkoter	39.30
B. Samuels	87.00
A. Steffen	35.75
Stegmeier Bros.	240.00
William Tron	256.00
William G. Weiss	75.00
E. H. Wilson	115.00
M. Wolfe	12.50
Badger Furniture Co.	550.00
L. S. Ayres & Company	584.00
William H. Block	970.00
Besten & Langen	152.50
Bobbs-Merrill Company	258.00
Charles Hartman	57.00
Iske Brothers	14.50
W. H. Messenger	44.00
L. E. Morrison	35.50
M. Moyer	198.00
Charles Mayer & Co.	695.00
Peoples Outfitting Co.	325.00
F. H. Rupert	32.00
Sander & Recker	39.00

Vonnegut Hardware Co.	266.00	
Julius C. Walk & Son	114.00	
H. P. Wasson & Co.	2410.00	
	$9515.05	
Estimated operating expenses 50%	4757.52	
Estimated profits		$4757.53

Endorsed: Filed Dec. 3, 1903. Marshall E. Sampsell, Clerk.

20 *Copy of Stipulation Waiving Jury. Filed April 10th,* 1905.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

Gen. No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT CO.

It is hereby stipulated by and between the parties to the above entitled cause that a jury may be waived therein, and the said cause be submitted to the court for trial without the intervention of a jury; And it is further stipulated between the parties hereto that this stipulation is made, and any order of court entered thereon shall be, without prejudice to the defendant to present and raise before the court the question of jurisdiction which has been heretofore presented in this cause.

NEWTON WYETH,
Attorney for Plaintiff.
CHARLES H. ALDRICH,
Attorney for Defendant.

Dated this 27th day of March, A. D. 1905.

(Endorsed:) Filed April 10, 1905. Marshall E. Sampsell, Clerk.

21 *Copy of Order of Monday, September 18th,* 1905, *Before Hon. Arthur L. Sanborn, District Judge.*

26678.

JAMES B. CLOW & SONS, a Corporation,
vs.
MERCHANTS HEAT & LIGHT COMPANY, a Corporation.

Now on this day come again the parties by their attorneys, the plaintiff being represented by Mr. Newton Wyeth, one of its attor-

neys, the defendant by Mr. Charles H. Aldrich, Mr. W. H. H. Miller and Mr. Henry S. McAuley; and thereupon the Court being fully advised in the premises finds the issues for the plaintiff and assess- its damages against said defendant at the sum of Nine Thousand and Eighty-two Dollars and twenty-one cents ($9082.21).

It is thereupon considered and adjudged by the Court that the plaintiff, James B. Clow & Sons, have and recover of said defendant, Merchants Heat & Light Company, said sum of Nine Thousand and Eighty-two Dollars and twenty-one cents ($9082.21) its damages so as aforesaid found together with the costs herein to be taxed, and that the plaintiff have execution therefor; and by agreement of counsel this judgment is now entered *nunc pro tunc* as of September 6th, 1905, to the entry of which judgment the defendant excepts and presents its bill of exceptions, which is duly signed and sealed by the trial judge, and filed by the clerk of said court.

22 Bill of Exceptions, petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, Order allowing Writ of Error and Certificate of jurisdictional questions involved, filed Monday September 18th, 1905, are in the words and figures following, towit:

23 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

26678.

CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Bill of Exceptions.

Be it remembered that in the above entitled cause the defendant moved to quash the service of process in said cause, which motion was opposed by the plaintiff, and on the hearing of such motion such proceedings were had that the following bill of exceptions was signed and sealed therein, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Be it remembered that in the above entitled cause the defendant moved to quash the Marshall's return to the summons, appearing

specially for that purpose and not otherwise, and in support
24 of said motion, which was in the words and figures following, to-wit:

"Circuit Court of the United States, Northern District of Illinois, Northern Division.

No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Motion to Quash Marshall's Return to Summons.

The Merchants Heat and Light Company, defendant in the above entitled cause, appears specially for the purpose herein set forth and for no other purpose, and hereby moves the court to quash the return of the Marshal upon the summons issued in said cause, a copy of which summons and return are attached to this motion, for the reason that said defendant is and was at the time this action was commenced and ever since has been a corporation organized and existing under the laws of the State of Indiana, and engaged in business only in said State and never has had any office, place of business or agency in the State of Illinois.

CHARLES H. ALDRICH,
Attorney for Defendant."

Filed the affidavit of William H. Schott, which affidavit was in the words and figures following, to-wit:

"STATE OF INDIANA, *Marion County, ss:*

William H. Schott, being duly sworn upon his oath, says that he is a citizen and resident of the City of Chicago, Illinois; that he is by occupation an engineer and contractor and has and maintains offices in the Marquette Building in said city of Chicago; that he is engaged in the construction, equipment and operation of water heating and lighting plants at various places in the United States; that for six months last past he has been engaged, among other things, in installing a steam heating and electric lighting plant for the Merchants Heat & Light Company, a corporation organized and existing under the laws of the State of Indiana and doing business in the city of Indianapolis in said State; that said plant is being con-
25 structed for the purpose of supplying the merchants and other citizens of said city of Indianapolis with light, heat and power and that said Merchants Heat and Light Company is not engaged in any business in the said city of Chicago or State of Illinois as affiant is informed and believes.

Affiant further says that at the time he was served with summons in the case of James B. Clow & Sons against Merchants Heat and Light Company on the twenty-third day of March, 1903, he was in

his office in the city of Chicago engaged in his own personal business and was not there as the representative of the said Merchants Heat and Light Company for any purpose, and that the said Merchants Heat and Light Company neither at the time of such service nor at any other time has had any place of business, office, agency or agent authorized to conduct any business for it in the State of Illinois.

And further saith not.

W. H. SCHOTT.

Subscribed and sworn to before me this 2nd day of May, 1903.

JAMES W. FESLER,

[SEAL.] *Notary Public.*

Commission expires May 2, 1904."

And likewise in support of said motion the affidavit of William C. Bobbs, which affidavit was in the words and figures following, to-wit:

"STATE OF INDIANA, *Marion County, ss:*

William C. Bobbs, being duly sworn upon his oath, says that he is a citizen and resident of the city of Indianapolis in the state of Indiana; that he is President of the Merchants Heat and Light Company of said city; that said company is a corporation organized and existing under the laws of the State of Indiana, engaged in supplying heat, light and power to the merchants and other citizens of said city of Indianapolis; that said company has no office or place of business of any kind whatsoever in the city of Chicago, nor is it engaged in business of any kind in said city or state, but its sole business and place of business is at the said city of Indianapolis, and it has not now and never has had any office, agency, place of business or agent authorized to carry on business for it in the state of Illinois.

And further saith not.

WILLIAM C. BOBBS.

Subscribed and sworn to before me this 2nd day of May, 1903.

JAMES W. FESLER,

[SEAL.] *Notary Public.*

Commission expires May 2, 1904."

26 And the plaintiff in said cause, in opposition to said motion to quash, filed the affidavit of William E. Clow, which affidavit was in the words and figures following, to-wit:

"UNITED STATES OF AMERICA,
Northern District of Illinois:

In the Circuit Court of the United States for the Northern District of Illinois.

No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Comes now William E. Clow, w-o being duly sworn on his oath, deposes and says that he is and during the whole of the time during which the negotiations between the plaintiff and the defendant herein with reference to the matters in controversy in this cause were being conducted, has been continuously and still is the Vice President of the plaintiff and actively engaged in the conduct of its affairs; that he knows W. H. Schott and has had repeated conferences with him with reference to the matters in controversy between the plaintiff and the defendant in this cause; that the said W. H. Schott has throughout in all the said matters in controversy in this cause acted as the representative and General Manager of the defendant; that during the whole of such time the said W. H. Schott has maintained and still does maintain an office in the building known as the Marquette Building in the city of Chicago, Northern District of Illinois; that at said office the business between the plaintiff and the defendant has been conducted; that this affiant representing the plaintiff has had numerous conferences with the said W. H. Schott representing the defendant at the said office; that he has at various times conferred with said W. H. Schott with reference to said matter over the telephone with said W. H. Schott at the said office in the said Marquette Building; that so far as this affiant is informed and believes no person other than attorneys who may represent the said defendant in court has had any share in the said negotiations or in any business between this plaintiff on behalf of the defendant except the said W. H. Schott; that the said office in the said Marquette Building was continuously treated as the office and place of business of the defendant where all its business was transacted and the said W. H. Schott as its regular and only authorized representative; that practically the whole negotiations and the making of the contracts between the
27 plaintiff and the defendant with reference to the matters in controversy herein were had and done in the city of Chicago, in said Northern District of Illinois, and at the said office of the defendant in said Marquette Building; that the said W. H. Schott during the whole of said period since said negotiations began and up to the present time was and is a resident of the State of Illinois and of the said city of Chicago; that the said W. H. Schott has been by the defendant continuously advertised as its General Manager, and upon the letter heads of the defendant upon which in the correspondence between the plaintiff and the defendant the said defendant wrote its letters, the said W. H. Schott is advertised as the General

Manager of the defendant, samples of which letters are submitted; that said office in said Marquette Building has been by the defendant recognized and treated as the office of the defendant, as shown by the correspondence of the defendant submitted herewith and otherwise; that the letters and telegrams submitted herewith purporting to come from W. H. Schott, or from the defendant, are genuine and received by the plaintiff from the defendant in the usual course of mail.

And deponent further sayeth not.

WILLIAM E. CLOW.

Subscribed and sworn to before me this 12th day of June, A. D. 1903.

JAMES F. SLAPAK,
Notary Public,
Cook County, Illinois.

[SEAL.]

My Commission expires Jan. 20th, 1907."

And also read in evidence the following letters and telegrams referred to in said affidavit, to-wit:

"CHICAGO, ILL., *Sept. 27th*, 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please enter our order for immediate shipment to Indianapolis, in addition to the orders which you now have, for 300 ft. 3 in. galvanized pipe and

60—3 x 1 Galv. Tees.
25—2½ x 1 Galv. Tees.
50—1½ x 1 " "
70—1 x 1 " "
265—1 in. Plugs.
2—3 in. Brass gate valves.
2—2½ " " "
1—2 " " "
3—1½ " " "

28 On the 20" pipe line there shall be placed on the end of each pipe a flange pecned on for all fittings, valves and expansion joints.

Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"W. H. Schott, Engineer & Contractor, Marquette Building.

L. D. Tele. Cen. 2448.

Specialties.

Gen. Station Htg. Plants, Water Works, Gas Plants, Elec. Light, Power & Street Ry. Plants.

CHICAGO, ILL., *Sept. 6th,* 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please ship to us promptly as possible:

2—20" flanged American valves with wheel.
2—15" " " " " "
1—20" " ¼ Bends.
22—20 x 10 " Tees.
2—20 x 12 " "
2—20 x 15 " "
1—20 x 20 " "
6—20 x 10 " Crosses.
1—20 x 12 " "
1—20 x 15 " "
1—20" Blank Flange.
1—20 x 15 Flanged Reducer.

All 20" pipe to have standard flanges shrunk on and peened, and list of flanges does not include flanges on pipe. All 15" pipe to be screw and socket. Ends at expansion joints to be threaded only; no couplings to be thereon.

10—15 x 10 Flanged Tees.
1—15 x 15 " "
2—15" Flanges, tapped 12"
2—15 " " 15"
2—15 " blank.
3—12 " tapped 12"
1—12 " blank.
26—10 " tapped 10"
18—10 " blank.

All flanges and fittings to be faced and drilled standard, page 62 The Clow Catalogue. Mark Each Pipe Section to which it belongs and mark pipe in consecutive numbers.

29 Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"CHICAGO, ILL., *Sept. 27th,* 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please enter our order for immediate shipment to Indianapolis, in addition to the orders which you now have, as follows:

1—15" American Flanged gate valves, together with companion flanges.
5—15 x 10 Flanged Crosses.
10—10 in. Companion Flanges, tapped for 10" pipe.
1—15 in. " " " " 12" "
12—15 in. " " " " 15" "

Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"Merchants Heat and Light Company.

Offices 208, 209, 210 Majestic Bldg.

Wm. C. Bobbs, Pres.; H. P. Wasson, V.-Pres.; Ferdinand I. Mayer, Treas.; Henry Kahn, Auditor; W. H. Schott, Gen. Mgr.; Frederick M. Ayres, Sec'y.

INDIANAPOLIS, IND., *June 6th*, 1903.

Mr. W. E. Clow, James B. Clow & Sons, Chicago, Ill.

DEAR SIR: Replying to your favor of the 4th will say, that I will not be here to take care of any business until about the 18th
30 and at that time will take up in detail the various credits to which we are entitled.

Yours very truly,

W. H. SCHOTT, *Gen. Mngr.*"

"Postal Telegram & Cable Company.

Telegram.

INDIANAPOLIS, IND., *Dec.* 27, 1902.

Paid.

James B. Clow & Sons, Chicago, Illinois:

See Mr. Schott at Chicago office Monday 10 A. M.

MERCHANTS HEAT & LIGHT COMPANY."

"Merchants Heat and Light Company.

Offices 208, 209, 210 Majestic Bldg.

Wm. C. Bobbs, Pres.; H. P. Wasson, V.-Pres.; Frederic M. Ayres, Sec'y; Ferdinand L. Mayer, Treas.; Henry Kahn, Auditor; W. H. Schott, Gen. Mngr.

INDIANAPOLIS, IND., *Sept. 4th*, 1902.

James B. Clow & Sons, Chicago, Illinois.

GENTLEMEN: Please enter our order for immediate shipment, prices to be in accordance with our contract, for the following list of fittings:

20—12" cast iron screwed tees.
20—10 " " " "
20— 8 " " " "
20—12 plugs.
20—10 "
20— 8 "
1—12 to 10 bushing.
10—12 to 8 "
10—12 to 6 "
10—12 to 4 "
20—10 to 8 "
20—10 to 6 "
20—10 to 4 "
10—8 to 6 "
10— 8 to 4 "

31

4—12" American Flanged Gate Valves.
2—10" " " " "
3— 8" " " " "

Please ship these goods at the earliest possible date, and oblige,
Yours very truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

And likewise in opposition to said motion to quash, the affidavit of Horatio S. Collins, which affidavit was in the words and figures following, to-wit:

"UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the Circuit Court of United States for Northern District of Illinois.

No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

Comes now Horatio S. Collins, who being duly sworn on his oath, deposes and says: that he is, and prior to and ever since the 13th day of August, 1902, was in the employ of the plaintiff herein as *therein* City Salesman for the City of Chicago; that as such City Salesman he conducted the negotiations with the defendant, Merchants Heat and Light Company, which resulted in the execution of the contract on August 13th, 1902, between the plaintiff and the defendant herein, a copy of which is attached hereto and made a part hereof; that in said negotiations and in the execution of said contract this affiant represented the plaintiff, and W. H. Schott, as General Manager of the defendant, represented and acted for the defendant;

that said contract was signed "James B. Clow & Son" by this affiant and accepted this 13th day of August, 1902, "Merchants Heat and Light Company," by W. H. Schott, General Manager; that all of the negotiations leading up to the said contract, and up to the sale by the plaintiff to the defendant of the various goods and
32 chattels described in said contract and in the declaration herein, the said W. H. Schott acted for, and as the representative and agent of the defendant; that the said W. H. Schott during the said entire period was and still is a resident of the city of Chicago in said Northern District of Illinois; that his acts as General Manager of said corporation in the said negotiations and in the execution of said contract have been recognized, adopted and acted upon by the said defendant; that the said W. H. Schott is by the said defendant regularly advertised as their General Manager, as, for example, upon the letter heads of the said corporation; that considerable correspondence has taken place with reference to the matters in controversy in this declaration between the plaintiff and the defendant; that the said correspondence has been conducted on the part of the defendant almost entirely by the said W. H. Schott as General Manager of the defendant; that the numerous letters received by the plaintiff from the defendant are almost all upon the letter heads of the defendant, in which the said W. H. Schott is advertised as, "General Manager."

That during the whole of the time during which said negotiations were taking place, and when said contract was made, and when the various goods and merchandise referred to in the declaration herein were delivered by the plaintiff to the defendant, the said W. H. Schott maintained an office at a building in the city of Chicago, in said Northern District of Illinois, known as the Marquet-e Building, at which office the said defendant, W. H. Schott, acting on behalf of, and as the General Manager of the said defendant, conducted all of the business transacted by the plaintiff with the defendant; that this affiant was at numerous times in the said office in the Marquette Building with the said W. H. Schott and always upon the business in which the said W. H. Schott was acting for and representing the said defendant; that this affiant verily believes that the said W. H. Schott is the regular authorized agent of the said defendant in the city of Chicago, and that the office maintained by the said W. H. Schott in the city of Chicago is and during the whole period herein referred to has been the regular office of the defendant in the said city of Chicago, that after the making of said contract this affiant repeatedly met the said W. H. Schott in the said office in the Marquette Building usually on Mondays and always with reference to the business in which the said W. H. Schott acted as the General Manager and representative of the defendant, which office has ever since been and still is maintained by the said W. H. Schott with no visible change in the ownership and management thereof; that the whole of the business relating to the matters in controversy in this suit have been conducted on behalf of the defendant by said W. H. Schott, and

Deponent further sayeth not.

HORATIO S. COLLINS.

33 Subscribed and sworn to before me this 12th day of June, A. D. 1903.

JAMES F. SLAPAK,
[SEAL.] *Notary Public,*
Cook County, Illinois.

My Commission expires Jan. 20th, 1907."

"CHICAGO, *August 13th,* 1902.

Merchants Heat & Light Co., 209 Majestic Bldg., Indianapolis, Ind.

GENTLEMEN: We hereby agree to furnish you with the pipe, valves and fittings, detailed specifications on the amount to be furnished as to the list of fittings, valves, etc., within ten days, and the list of pipe given you herewith is subject to change, such change, however, to be made prior to August 20th. Prices for the material to be as per correspondence, telegrams, etc., under dates of August 4th, 5th and 6th, 1902, and on the large pipe to be as per detail sheet under date of August 13th, all attached hereto and made a part of this proposition.

It is understood that the general specifications, which are subject to cor-ection so far as pipe is concerned, are as follows:

2525 ft. 20" O. D. ⅜ in. pipe to be threaded, coupled or flanged as per detail drawings to be furnished us prior to Sept. 1st.

1300 ft. 15" O. D. ⅜ in. pipe, with the option of 2230 ft., but notice to be given us on or before August 20th, to be threaded, coupled or flanged as per detail drawings to be furnished us prior to Sept. 1st.

2700 ft. 12" Standard Merchants Pipe, threaded and coupled
2300 ft. 10" " " " " "
3300 ft. 8" " " " " "
2500 ft. 3" Galvanized Pipe.
1300 ft. 2½" " "
2700 ft. 2" " "
3500 ft. 1" " "

In reference to the 12 in. 10 in. and 8 in. pipe, will say that on or before August 20th, you are to give us correct detailed specifications as to quantities, as we understand this may be increased or decreased.

It is understood that the 12 in. and under is to be shipped immediately upon receipt of detailed specifications, and that the 15 in. and 20 in. is to be delivered not later than October 1st, 1902.

34 Terms of payment,—usual.

Respectfully submitted,

JAMES B. CLOW & SONS,
By H. S. COLLINS.

Accepted this 13th day of August, 1902.

MERCHANTS HEAT & LIGHT COMPANY,
By W. H. SCHOTT, *General Manager.*"

And thereupon the said court overruled said motion to quash, and thereafter, upon motion made by the defendant in said action, the

said order overruling motion to quash, was set aside and leave given to said defendant to re-file the said motion.

And thereafter, to-wit: on the twenty-ninth day of July, A. D. 1903, the court again entered the following order, to-wit:

"UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

The order entered in the above entitled cause, filed of record under date of July 10th, 1903, which order being in substance as follows:

"Upon application of the defendant herein, leave is hereby given to said defendant to re-file the motion heretofore made to quash the service in said cause, and the order heretofore entered requir-
35 ing the defendant to plead is set aside until the further order of this court" is hereby set aside, and the motion to quash service refiled by leave of said order of July 10th, 1903, is hereby overruled and the defendant is ordered to plead or demur to the plaintiff's declaration filed herein within thirty days.

WM. H. SEAMAN, *Judge.*"

Dated July 29, 1903.

in said cause, to which action of the court in overruling the motion to quash said summons and retaining jurisdiction in said cause the defendant then and there excepted, and asked and obtained leave within thirty days to file its said bill of exceptions to the action of the court herein.

And forasmuch as the facts and the decision of the court thereon do not appear of record, the defendant prays that this its Bill of Exceptions may be allowed.

Allowed and settled this 27th — of Aug., 1903.

WM. H. SEAMAN, *Judge.*

And the defendant was then ruled to answer, and thereupon, on the tenth day of April, 1905, it was stipulated between the parties as follows, to-wit:

"In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT CO.

It is hereby stipulated by and between the parties to the above entitled cause that a jury may be waived therein, and the said cause be submitted to the court for trial without the intervention of a jury;

36 And it is further stipulated between the parties hereto that this stipulation is made, and any order of court entered thereon shall be, without prejudice to the defendant to present and raise before the court the question of jurisdiction which has been heretofore presented in this cause.

NEWTON WYETH,
Attorney for Plaintiff.
CHARLES H. ALDRICH,
Attorney for Defendant.

And thereupon said case was submitted to the court for trial as per said written stipulation of counsel, without the intervention of a jury, with the request that the court make findings of fact and conclusions of law.

And thereupon, on the 31st day of August, 1905, in accordance with said stipulation, the court made, and filed, its findings of fact and conclusions of law, in words and figures as follows, to-wit:

"United States Circuit Court, Northern District of Illinois, Northern Division.

JAMES B. CLOW & SONS, Plaintiff,
vs.
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

This action comes on to be tried by the court without a jury, on May 23, 1905, the parties having stipulated in writing that a

37 trial by jury should be waived, Newton Wyeth, Warren B. Wilson and Walter L. Fisher appearing for the plaintiff and Charles H. Aldrich for the defendant, and the court having heard the evidence and the cause having been argued by counsel, the following findings of law and fact are made and filed by the court this 31st day of August, 1905.

Findings of Facts.

1. For the last ten years William H. Schott has been a contractor and civil engineer, doing business and residing at Chicago, making a specialty of organizing corporations for heating and lighting pur-

poses, and designing and building plants under contracts with such corporations. From 1899 to the present time said Schott has maintained a business office in the Marquet-e Building, Chicago, designated William H. Schott, Engineer and Contractor, having his own name on its door, and for which he paid the rent. Defendant was organized as an Indiana corporation prior to August, 1902, for the purpose of building and operating a plant for the furnishing of heat, light and power in Indianapolis, Indiana, and being purely a local corporation of that state. On August 7, 1902, defendant and said Schott made a written contract, by which Schott agreed to construct, install and equip its plant, purchase all materials and apparatus necessary thereto, employ all necessary labor, at the best possible terms for defendant, personally superintend such construc-
38 tion, assume general management of the plant, and operate it for the company until fully completed, secure all business for the plant, approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903; and to pay as liquidated damages fifty dollars for each day that steam was not provided for customers after December 1, 1902. The company was to pay Schott for the plant $275,079.38, including his compensation, which was to be ten per cent. of all bills for construction. Said Schott continued to be the general manager of defendant until July, 1903, this suit having been commenced March 23, 1903, by service of summons on said Schott at his office in Chicago. At this time the construction of the plant had not been entirely completed. Said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies for the extension of the plant, was done for defendant by said Schott as general manager, down to a time later than the beginning of this action. On Aug. 13, 1902, the contract in suit was made between plaintiff and said Schott as such general manager.

Section 5 of chapter 110, of the Statutes of Illinois, provides that a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Defend-
ant never has maintained any office or had any property in
39 Cook County, Illinois, nor has it had any business therein except such as it has done through its said general manager.

The city of Chicago was and is the principal market for supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in this finding. A modification of the contract of August 13, 1902, by which flanges on the pipe were substituted for coupling and thread fastenings, was made between the plaintiff and said Schott, as general manager of defendant, in the city of Chicago. All business relating to the execution of said contract, except what was done by correspondence, was had at the office of said Schott in Chicago, and by him on behalf of defendant.

About the first of January, 1903, a controversy arose between the parties in respect to the final payment under said contract, and the

right of defendant to set off damages for delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were had at the office of said Schott in Chicago between him as general manager of defendant and the agents or attorneys for the plaintiff in respect to the adjustment of the controversy.

2. On August 13, 1902, the plaintiff, an Illinois corporation, entered into a contract with defendant for the pipe necessary in the construction of its plant, at prices which amount, as claimed by the plaintiff, to the sum of $33,933.84. Such contract provided
40 that defendant should furnish detail drawings of the 15 and 20 inch pipe prior to September 1, 1902, and specifications of the balance of the pipe August 20, 1902; and it was agreed that the 12 inch pipe should be shipped immediately on receipt of specifications, and the 15 and 20 inch pipe was to be delivered not later than October 1, 1902. All the negotiations leading up to the making of the contract of August 13, 1902, were had at the office of said Schott in Chicago, defendant being therein represented by him. Said contract was entered into in Chicago, was in all respects an Illinois contract, and was signed on behalf of defendant by said Schott as general manager.

Defendant has paid upon the contract $24,833.63, leaving a balance as claimed by plaintiff, of $9,417.37, less freight paid by defendant of $316.17.

3. During the negotiations leading up to the contract of August 13, 1902, the plaintiff was informed by said Schott that the time of delivery of the material contracted for would enter into the relations of the parties as much as the price, and that defendant must have the material by a certain date in order to deliver heat by December 1, 1902; and that, for that reason, the contract should be made without any provision excepting delays from strikes, car shortages and other like causes of delay. The contract of August 13, 1902, fixing the time of delivery of the 15 and 20 inch pipe not later than October 1, 1902, was made with direct reference to any and all damages which the defendant might suffer consequent upon a failure of delievery at the time specified.

41 *4.* Before making any general appearance the defendant appeared specially and moved the court, upon the record and certain affidavits appearing in the bill of exceptions settled by the court August 27, 1903, to quash the return of service made by the marshal, on the ground that the defendant was a foreign corporation, and had no business, office, place of business or agency in Illinois. Said motion was denied by the court July 29, 1903, and an order entered requiring defendant to plead or demur to the declaration within thirty days. Accordingly, and on August 10, 1903, defendant pleaded the general issue, together with a notice of set off claiming damages in the sum of $15,000 by reason of plaintiff's failure to furnish the 15 and 20 inch pipe until some time after the first day of October, 1902.

Afterwards, and on December 3, 1903, defendant filed a bill of particulars of certain overcharges claimed by it to have been made by

plaintiff, and the damages claimed by it by reason of delay in furnishing pipe, as follows:

Overcharges Claimed.

Oct. 16, 1902, overcharge on 15 inch pipe.....	$197 26
" 20 " do.	144.31
(Paid by defendant Nov. 8, 1902)	
Nov. 5, 1902, overcharge on 20 inch pipe.....	213.57
" " " do.	219.77
" 8 " do.	204.73
" 12 " do.	234.01
(Paid by defendant Nov. 21, 1902)	
Increased cost of purchase of 72 feet 20 inch pipe over contract price	18.00

42 *Damages for Delay.*

Expense of refilling and re-excavating trench and extra barricades due to failure to furnish above 72 ft.....	210.00
Increased cost of laying 2325 ft. of 15 and 20 inch pipe after frost in Dec., Jan. and Feb., at $2.75 per foot....	6,393.75
Additional premiums for liability insurance.....	575.83
Additional expense for Supt. and foreman.....	1,055.00
Estimated loss on contracts for heat.....	6,608.10
Estimated loss on contracts for light and power.....	4,757.53
Total	$20,831.89

5. No 15 or 20 inch pipe was delivered to defendant by plaintiff until about the middle of November, 1902, and the last delivery was not made until January, 1903. Defendant commenced delivery of heat under contracts with its customers December 31, 1902, but only on part of the line of its plant.

6. The contract between the parties provides that the price of the 15 inch pipe to be furnished shall be $3.32 if furnished in standard or "random" lengths, as it comes from the mill, without being cut to any special length, but if cut to fit any specified place the price shall be $3.61. It also provides that the price of the 20 inch pipe, random lengths, shall be $4.48 and if cut shall be $4.67. According to the blue print furnished August 28, 1902, it was not neces-

43 sary to cut all of the pieces of pipe, but only single pieces in the separate sections of the work, between certain points where several lengths were required, leaving the other pieces in such sections standard length. I do not determine whether the larger or smaller price is the one proper to be charged, in view of the facts found in paragraph 9 hereof, to the effect that the bill for the larger amount was paid without objection. It is further found that plain-

tiff and defendant by their conduct construed the contracts as justifying the charges made by plaintiff.

7. The specifications and drawings furnished by defendant August 28, 1902, included all of the 15 and 20 inch pipe except four lengths of 20 inch pipe and a small amount of 15 inch pipe. A drawing showing the four lengths of 20 inch pipe was furnished on the 10th day of November, 1902, and the specifications of the 15 inch pipe not furnished August 28th were furnished September 15, 1902. I do not find, however, that the delay in furnishing these specifications had any effect in postponing the delivery of other pipe covered by the drawings furnished August 28, 1902, some of which was not delivered until January, 1903, and none of which was delivered until about the middle of November, 1902.

8. Notwithstanding the delay in the delivery of the 15 and 20 inch pipe, deliveries thereof were received from time to time by defendant after the time stipulated in the contract, without objection, and without any notice or intimation to plaintiff that any
44 damages for delay would be claimed, until January 10, 1903; but the said Schott had several times prior thereto urged plaintiff to hurry such deliveries. On December 29, 1902, the said Schott and William E. Clow, vice president and managing agent of plaintiff, met by previous arrangement at the office of said Schott in Chicago to discuss the question of final payment under the contract, in which conversation said Schott promised to pay the whole balance claimed by plaintiff to be due on the contract except the final invoice of about $1200 value, which had not then been received, not later than January, 1903. At this time said Schott made no claim whatever for damages for delay in furnishing the pipe, but informed said Clow that defendant would not pay for such final installment until a claim made by defendant that some of the pipe was so bent that it could not be laid without extra expense should be adjusted. Such claim is not made in the bill of particulars, and has either been adjusted or abandoned.

9. Bills for the pipe claimed by defendant to have been standard or random length were presented and paid by defendant without the attention of Mr. Schott being particularly called to the fact that the pipe was billed and charged for as cut pipe at the higher price mentioned in finding 6. After his attention was called to the fact he did not make claim for deduction or reimbursement for about a year, long after this suit was begun, and not until December 8, 1903.

45 *10.* That through some mistake plaintiff did not furnish sufficient 20 inch pipe, as required by the drawings, and defendant was obliged to purchase seventy two feet of such pipe, at an increased cost of eighteen dollars over the contract price, which excess should be allowed to defendant.

11. The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for increased cost in making excavations for laying of pipe or pipe and fittings.

12. The court finds that there is not sufficient evidence in this case to sustain the claim of the defendant for damages as claimed by it

and sought to be set off or allowed to it in this suit for additional expense for Superintendent and Foreman.

13. The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for additional premium for liability insurance paid by the defendant as alleged by it.

14. The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for increased expense of refilling and excavating trench for the laying of certain seventy-two feet of pipe as alleged by the defendant.

46 *15.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for loss on account of contracts for heating.

16. The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for loss on account of contracts for light and power.

17. The court finds from the evidence in the case that the plaintiff sold and delivered to the defendant iron pipe, fittings and material, for which the plaintiff seeks to recover herein of the value and of the agreed price of Nine Thousand four hundred seventeen dollars and thirty-seven cents ($9,417.37), from which is to be deducted Three hundred seventeen dollars and sixteen cents ($317.16) and eighteen dollars ($18.), leaving a balance of Nine Thousand eighty-two dollars and twenty-one cents ($9,082.21); and that the amount of said balance was due and unpaid at and before the bringing of this suit; and that the same remains unpaid.

Conclusions of Law.

1. Defendant was during all the time from August 12, 1902, to the commencement of suit, doing business in Chicago, Illinois, and during all that time William H. Schott was its general
47 managing agent. Service of summons was properly made upon him, as such agent.

2. By claiming of plaintiff in the bill of particulars a sum greater than the amount of plaintiff's claim defendant became in effect a plaintiff, thus invoking the jurisdiction of the court in its behalf, and thereby waiving its right to be sued in Indiana, and not in Illinois.

3. The delay in furnishing detailed drawings or specifications of pipe was without injury to the plaintiff, and immaterial.

4. By its conduct defendant waived all right to damages for not furnishing the 15 and 20 inch pipe at the time stipulated in the contract.

5. Defendant waived its right to possible reimbursement for over-

charges on pipe by reason of the facts found in paragraphs six and nine of the findings of facts.

6. At the time of beginning suit defendant was indebted to plaintiff for material delivered under the contract of August 13, 1902, in the sum of nine thousand eighty two dollars and twenty-one cents, and judgment therefor is hereby directed in favor of the plain-
48 tiff and against the defendant, with costs.

By the Court,

ARTHUR L. SANBORN, *Judge.*

Dated Aug. 31, 1905.

(Endorsed:) Filed Aug. 31, 1905. Marshall E. Sampsell, Clerk.

To each of which findings of fact and conclusions of law the defendant then and there took exception; and made a motion for a new trial, which was by the court overruled. And thereupon, to-wit: on the sixth day of September, 1905, the court entered judgment upon said findings of fact and conclusions of law, in favor of the plaintiff and against the defendant, in the sum of nine thousand eighty-two dollars and twenty-one cents, according to the findings of fact.

And thereupon the defendant gave notice of its intention to take the said case to the Supreme Court of the United States, upon the question of jurisdiction only, and asked, and obtained, leave to file its petition for writ of error, bond, with approved security, in the sum of twelve thousand dollars, assignment of errors and bill of exceptions, within fifteen days from the said sixth day of September, 1905.

And as these matters do not fully appear in the record, this bill of exceptions is signed and attested this 18th day of September, A. D. 1905.

A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

49 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

MERCHANTS HEAT & LIGHT COMPANY, Plaintiff in Error,
vs.
CLOW & SONS, Defendant in Error.

Petition for Writ of Error.

And now comes Merchants Heat & Light Company, plaintiff herein, and says, that on or about the sixth day of September, 1905, the circuit court entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correc-

tion of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALDRICH & McAULEY,
CHARLES H. ALDRICH,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

50 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

CLOW & SONS, Plaintiff,
vs.
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

1. The court erred in taking jurisdiction in said cause.

2. The court erred in holding that William H. Schott occupied such relations to the defendant that he could subject it to this court's jurisdiction, when engaged in the prosecution of his own business in his own office in Chicago.

51 *3.* The court erred in holding that by claiming in the bill of particulars a sum greater than the amount of plaintiff's claim, the defendant became in fact a plaintiff, and thus invoked the jurisdiction of the court in its behalf, and thereby waived its right to be sued in Indiana, and not in Illinois.

For which manifest errors the plaintiff in error and defendant prays that the judgment be reversed, and said cause be dismissed.

CHARLES H. ALDRICH,
ALDRICH & McAULEY,
Attorneys for Defendant and Plaintiff in Error.

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

52 Know all men by these presents, that we, Merchants Heat & Light Company, a corporation, as principal, and the American Fidelity Company, of Montpelier, Vt., as surety, are held and firmly bound unto James B. Clow & Sons in the full and just sum of twelve thousand dollars ($12,000.), to be paid to the said James B. Clow & Sons, *their* certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of September, A. D. 1905.

Whereas, lately at a circuit court of the United States, in a suit depending in said court, between James B. Clow & Sons, plaintiff, and Merchants Heat & Light Company, defendant, a judgment was rendered against the said Merchants Heat & Light Company, and the said Merchants Heat & Light Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James B. Clow & Sons, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the ninth day of October next, 1905.

Now, the condition of the above obligation is such that if the said Merchants Heat & Light Company shall prosecute said writ
53 of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] MERCHANTS HEAT & LIGHT COMPANY,
By EDW'D L. McKEE, *Pres't.* President.

Attest: FREDERIC McAYRES, *Secretary.*

[SEAL.] AMERICAN FIDELITY COMPANY,
By S. N. CHAMBERS,
Resident Vice-President.
N. C. VETTE, *Resident Secretary.*

I hereby waive service of citation on Writ of Error secured by the above bond.

NEWTON WYETH,
Attorney for James B. Clow & Sons,
Defendants in Error.

Approved as to form and sufficiency of surety.
A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

54 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

CLOW & SONS, Plaintiff,
vs.
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

This 18th day of September, 1905, comes the defendant by its attorneys, and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Su-

preme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, and it appearing to the court that a bond, conditioned according to law, in the sum of twelve thousand dollars, has been filed, the court does allow the writ of error, and orders that the said bond shall operate as a supersedeas bond.

A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk

55 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 26678.

JAMES B. CLOW & SONS
vs.
MERCHANTS HEAT & LIGHT COMPANY.

This is to certify that in this cause the defendant moved to quash the service of process herein on the ground that the service upon William H. Schott was not such as entitled the plaintiff to proceed against it in this jurisdiction, and in support thereof filed certain affidavits, while to support the jurisdiction of the court, the plaintiff filed also certain affidavits and other papers, all of which more fully appears by the bill of exceptions filed herein and made part of this record.

The question of jurisdiction was again heard upon final hearing before the court, without the intervention of a jury, in accordance with the written stipulation of counsel for the respective parties, and was passed upon by the court, as will more fully appear by the findings of fact and conclusions of law, as reduced to writing and filed in said cause, and preserved by bill of exceptions herein.

56 The writ of error is asked for, and allowed, to the Supreme Court of the United States solely upon the said questions of jurisdiction, which are:

1. Were William H. Schott's relations to the defendant company such that service upon him in Chicago constituted service upon the defendant, an Indiana corporation, in the Northern District of Illinois?

2. Was the filing of the counter-claim by the defendant a waiver of the jurisdictional question, and to be properly construed as a submission to the jurisdiction of said court?

A. L. SANBORN, *Judge.*

Attest: MARSHALL E. SAMPSELL, *Clerk.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

57 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States of America of the Seventh Judicial Circuit in and for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record and proceedings in the above entitled cause, including the præcipe, summons and return, declaration, petition and notice of set off, bill of particulars, stipulation waiving jury, judgment of September 6th, 1905, bill of exceptions, petition for writ of error, assignments of error, bond on writ of error, order allowing writ of error and certificate of jurisdictional questions involved as per præcipe for record filed herein and as the same remain of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court this 20th day of September A. D. 1905.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of United States Circuit Court, Northern District of Illinois.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between James B. Clow & Sons, a corporation etc., plaintiff and Merchants Heat & Light Company, a corporation etc., a manifest error hath happened, to the great damage of the said defendant, Merchants Heat & Light Company, a corporation, etc., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of September, in the year of our Lord one thousand nine hundred and five.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.

Allowed:
ARTHUR L. SANBORN, *Judge.*

59 [Endorsed:] Supreme Court of the United States. James B. Clow & Sons, a corporation, *vs.* Merchants Heat & Light Company, a corporation. Writ of Error. Copy deposited for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause prepared in accordance with the præcipe filed by the defendant therein this 20th day of September A. D. 1905.

MARSHALL E. SAMPSELL,
Clerk of United States Circuit Court, Northern District of Illinois.

Endorsed on cover: File No. 19,910. N. Illinois C. C. U. S. Term No. 118. Merchants Heat & Light Company, plaintiff in error, *vs.* James B. Clow & Sons. Filed September 22d, 1905. File No. 19,910.